IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1940

No. 32

ALFRED E. ROTH,

Petitioner,

vs.

THE UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

Petition

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Chicago, Ill.
Pro se.

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Petition

To the Honorable, the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Alfred E. Roth, petitioner, *pro se,* respectfully prays that a Writ of Certiorari issue to review judgment of the Circuit Court of Appeals for the Seventh Circuit, entered in the above cause (R. 1140), affirming the judgment of the District Court for the Northern District of Illinois.

Opinion Below.

The opinion of the Circuit Court of Appeals (R. 1117) is reported in 116 Fed. (2) 690.

Jurisdiction.

The judgment of the Circuit Court of Appeals was entered on December 13, 1940 (R. 1140). A petition for re-hearing was denied January 23, 1941 (R. 1239). The jurisdiction of this court is invoked under Section 347 (a) Title 28 United States Code.

Questions Presented.

1. Whether the total and systematic exclusion from the jury box, from which the petit jury was drawn, of females who were not members of a private league of women voters, and who had not attended jury classes maintained by the league for the purpose of giving instruction to potential jurors and whose lecturers presented the views of the prosecution, who otherwise possessed the requisite qualifications, was a denial of the constitutional right of trial by an impartial jury, and equal protection of the law and due process of law.

2. Whether a defendant is denied due process of law and a fair and impartial trial and deprived of the benefit of the presumption of innocence by the trial judge in (a) limiting the right of cross-examination to show bias, reward by and the coercive effect of government officers, (b) examining witnesses in a manner and making remarks favorable to the prosecution and prejudicial to the accused, (c) making statements of alleged facts based on his personal knowledge, (d) in admitting in evidence government agents' reports containing the criminal history of a co-defendant and ex parte statements tending to involve the co-defendant in a violation of the law.

3. Whether a defendant is denied a fair and impartial trial when the prosecution has resorted to persistent prejudicial misconduct.

4. Whether the evidence is so utterly insufficient as to require a reversal of the judgment.

5. Whether a defendant can be put to trial on an indictment which the record fails to show was returned in open court.

6. Whether a defendant may be put to trial on an indictment which is vague, indefinite and uncertain, and whether the charge of conspiracy will lie when the commission of the offense requires a concert of action by a plurality of agents.

7. Whether the appointment by the court of one defendant's counsel, over his objection on the ground of inconsistency of defenses, to represent a co-defendant so affects an effective representation as to result in prejudice to all defendants.

8. Whether a federal grand jury was illegally constituted and void because of the intentional, total exclusion of the names of women fron the jury box from which the grand jurors were drawn, the state law making it mandatory that women be placed on jury lists, and whether such an exclusion was a denial of equal protection of the law and of due process of law.

Statutes Involved.

1. Section 88, Title 18, U. S. C. A.
2. Section 91, Title 18, U. S. C. A.
3. Section 411, Title 28, U. S. C. A.
4. Section 412, Title 28, U. S. C. A.
5. Section 1, Chap. 78, Ill. Rev. Statutes 1939.
6. Section 25, Chap. 78, Ill. Rev. Statutes 1939.

The statutes are set out in the appendix.

STATEMENT OF THE CASE.

The petitioner was convicted upon the second count of an indictment (R. 22), the first count having been dismissed, together with four other defendants, Daniel D. Glasser, Norton I. Kretske, Anthony Horton and Louis Kaplan, of conspiracy to defraud the United States, in the Northern District of Illinois, of the conscientious services of Daniel Glasser, an assistant United States Attorney (Sec. 88 Title 18 U.S.C.). Glasser, Kretske and Kaplan were each sentenced to 14 months in a penitentiary, Horton to one year and one day in a penitentiary. The petitioner was sentenced to pay a fine of $500.00. Kaplan is involved in other criminal proceedings and did not appeal. Horton was granted probation and did not appeal.

The petitioner is engaged in the private practice of law, chiefly in federal practice. Glasser was an Assistant Attorney from March 13, 1935, to June 29, 1939. Kretske, while engaged in the private practice of law, referred to the petitioner for trial several federal matters (R. 805). Many lawyers referred federal matters to the petitioner (R. 749, 796, 889, 890, 783).

The trial was a long one, consuming about 26 days. The record is voluminous and the exhibits equally so, consisting of Grand Jury records, court files, agents' reports, criminal and civil pleadings and a mass of other material and it is clear that the trial was so colored by constant errors that the petitioner was tried in an atmosphere fatal to the administration of justice.

The theory of the prosecution as announced by the prosecutor (R. 154) was that there was a conspiracy on foot to

solicit certain persons to make promises. Although the government was ordered to file a bill of particulars naming the persons who made the solicitations and what persons were solicited and on what dates, and at what places and what amounts, it is significant that the name of this petitioner is not even mentioned in the entire 12 pages of the bill of particulars (R. 77-89) nor is there any inference therein of any wrongful act on the part of this petitioner.

The record clearly shows that the petitioner did not represent any client in any criminal case until after the institution of a prosecution and the defendants apprehended, and, in the libel (civil cases) after forfeiture proceedings were begun. Not one client testified that the petitioner directly or indirectly solicited him or her, nor that he made any promises other than that he would handle their cases on the merits to the best of his ability.

The Circuit Court of Appeals, in its opinion, stated:

> "We think it will suffice if we but enumerate the more important facts and appellants' connection or association with the suits and matters involved in the conspiracy." (R. 1122.)

Three cases in which this petitioner appeared as counsel, with Glasser opposing, were enumerated and he respectfully begs the indulgence of this Court while he briefly reviews them, which he believes will convince this Court that the Circuit Court of Appeals misapprehended the facts in the case and misapplied the law relating thereto.

1. *U. S.* v. *One Chrysler Sedan.*

The Court (R. 1123) seems to suggest that the petitioner, who represented the claimant, was making an inaccurate statement to the judge trying the libel case when he

stated that the automobile belonged to his client, Rose Vitale, and was not used in connection with the manufacture of alcohol. This statement was based on the sworn pleadings on file with the Alcohol Tax Unit and the United States District Court (Exhibit 36). The opinion infers that because the petitioner was successful over Glasser, who represented the government, that the petitioner was guilty of some wrongdoing. The case was tried on the alcohol tax unit agent's report.

The Circuit Court of Appeals seems to have overlooked the testimony of U. S. District Judge Barnes, who testified for the defense as follows:

"Q. And the point involved here, Judge is this. Were you sufficiently informed concerning the facts involved in that case to make a decision on the law and the evidence?

A. Well, it is the agent's statement. They never testified to more than their statement. They try their cases frequently on their statements, and that statement is not sufficient to forfeit a car. The car was not in the place where the still was, the car belonged to the wife, and I had no more right to take it than I had to take yours.

Q. And anything the agent might have said could not have changed that?

A. Well, he states in writing what he expected to prove. What he expected to swear to.

Q. And under these circumstances, you very often hear the cases without the actual testimony?

A. Very, very frequently.

Q. And did Mr. Roth appear to represent his client, and Mr. Glasser appear to represent the government in a proper fashion?

A. They not only appeared to, they did." (R. 718.)

2. *U. S.* v. *Elmer Swanson, Anthony Hodorowicz and Clem Dowiat.*

The opinion charges no misconduct on the part of the petitioner. It states (R. 1122) that the petitioner was retained as attorney to defend, having been recommended by Kretske. It also states that the petitioner represented the defendants and that Swanson paid no money to the petitioner for his services. The opinion overlooks that Kretske, after being retained, referred the three defendants to the petitioner for trial and made direct payment to him of a fee (R. 868). The Circuit Court infers that because this case was on motion of Glasser stricken, with leave to reinstate, that the petitioner was guilty of some wrongdoing.

When the petitioner and his clients appeared on the trial date, ready for trial, they learned that the case had been stricken a week prior thereto, with leave to reinstate, without notice to either clients or their counsel (R. 235-236).

The uncontradicted testimony is that the case was stricken with leave to reinstate by Glasser at the direction of the government agent in charge, who advised Glasser they did not have sufficient evidence to convict (R. 918-920).

Corroboration of Glasser's testimony that the case was stricken with leave to reinstate, at the request of the agent in charge, because of the weakness of the evidence, is furnished by the fact that the record discloses the case as never having been reinstated (Exhibit 226) with Glasser out of office a year.

3. *U. S.* v. *Frank Hodorowicz, Mike Hodorowicz, Peter Hodorowicz and Clem Dowiat.*

The opinion states (R. 1125) that the petitioner was engaged to represent the defendants and the opinion further states that while the case was pending in the District Court Frank Hodorowicz called at Glasser's office and had a conversation with him (R. 1125). The opinion further states that after this conversation the petitioner's services were dispensed with. The record fails to show any mention of the petitioner or anything concerning him in this conversation or that he had knowledge of it. While the petitioner represented Frank Hodorowicz he conferred with Glasser as to his attitude on a plea of guilty and was advised that his attitude was that of the imposition of a substantial penitentiary sentence (R. 858). The petitioner informed his clients of Glasser's attitude and was discharged as their attorney. Another attorney was substituted and all the defendants were convicted, Glasser prosecuting (R. 859).

The suits in which the petitioner appeared as counsel not enumerated or touched upon by the Circuit Court of Appeals are four in number, as follows:

1. *U. S.* v. *Paul Svec.*

The substance of the Government's evidence is that the petitioner represented Svec in two criminal cases, Glasser prosecuting. On the trial of the first case Svec was convicted and sentenced to the penitentiary (R. 566). While he was at large on an appeal bond he was again arrested and charged with another offense and after a full hearing before the U. S. Commissioner he was discharged (R. 557-559-564).

2. *U. S.* v. *Edward Dewes.*

The substance of the government's evidence is that Kretske referred Dewes to the petitioner to try his case. Petitioner tried the case and Dewes was convicted and sentenced to the penitentiary.

3. *U. S.* v. *Harry Dukatt.*

The substance of the government's evidence is that the petitioner represented Dukatt in a hearing before the U. S. Commissioner where he was discharged. That he was indicted in two cases and entered a plea of guilty to both indictments, being represented by the petitioner and was sentenced to the penitentiary (R. 700-701).

4. *U. S.* v. *151 Acres of Land, Etc.*

This case was brought out on cross-examination of the petitioner and involved a libel case. Attorney Sidney Baker tried the case in the District Court. Glasser, representing the government, was victorious. The case was referred to the petitioner by Mr. Baker to prosecute an appeal. The judgment of the lower court was reversed. 99 Fed. (2) 716. The petitioner represented one of the claimants who was indicted while the civil case was pending in the Circuit Court of Appeals (868-869) and was thereafter substituted by another lawyer who disposed of the criminal case (R. 880-881).

The testimony of Alexander Campbell, which of course had nothing to do with any case in the Northern District of Illinois, that the petitioner went to see him in Indiana five months after the Wroblewskis had been indicted in the Northern District of Indiana to ask him if something could be done about not indicting the Wroblewskis in the Northern District of Indiana is incredible and contradicted

by the physical facts, as the court records (Ex. 186-A and 186-C), correspondence (Ex. 137, R. 847) and testimony (R. 676, 838, 840) show that the Wroblewskis were under indictment for five months in the Northern District of Indiana and that the petitioner and the Wroblewskis had knowledge of this fact at the time of the alleged conversation.

Thus, the petitioner vigorously contends that the opinion of the Circuit Court of Appeals is based entirely on erroneous inferences and that the evidence is utterly insufficient to establish any guilt. No inference of guilt can possibly be drawn from accepting employment in defending alcohol cases or that Glasser represented the government in some cases when the petitioner was on the other side.

The trial judge prejudicially limited the right of cross-examination and throughout the trial committed acts of advocacy advantageous to the prosecution and injurious to the defense in examining witnesses and cross examining the petitioner in a hostile manner and in making remarks of a nature favorable to the prosecution and prejudicial to the petitioner's defense and his presumption of innocence. Some of the acts, with record references, are set out under the reasons for granting the writ.

In his anxiety to convict Glasser, which is apparent from a reading of the record, the prosecutor resorted to the most unfair tactics, so that the petitioner was tried in a foul and hostile atmosphere, which resulted in his wrongful conviction. Some of the instances with record references of the prosecutor's tactics are set out under the reasons for granting the writ.

The petitioner sincerely contends that because he appeared in a few cases against Glasser, which were re-

ferred to the petitioner by Kretske, the petitioner was a necessary victim in this case in a desire to "get" Glasser (R. 948).

Specification of Errors to be Urged.

1. The Circuit Court of Appeals erred in holding that it was a matter of discretion of the District Court, which was not abused in holding that the total and systematic exclusion from the jury box, from which the petit jury was drawn, of females who were not members of a private league of women voters, and who had not attended jury classes maintained by the league for the purpose of giving instruction to potential jurors and whose lecturers presented the views of the prosecution, who otherwise possessed the requisite qualifications, was not a denial of the constitutional right of trial by an impartial jury.

2. The Circuit Court of Appeals erred in holding that the acts and conduct of the trial judge did not deprive the petitioner of the presumption of innocence and prejudice his rights to a fair and impartial constitutional trial.

3. The Circuit Court of Appeals erred in holding that the misconduct of the prosecuting attorney permitted and sanctioned by the trial judge was not prejudicial to the petitioner and a denial of a fair and impartial trial.

4. The Circuit Court of Appeals erred in affirming the judgment based on no evidence, out which was brought about because of the acts and conduct of the trial judge and prosecutor and the cumulative errors which so permeated the trial that the petitioner was deprived of a fair and impartial trial.

5. The Circuit Court of Appeals erred in holding that the record showed that the indictment was properly returned in open court by the grand jury.

6. The Circuit Court of Appeals erred in holding that the indictment sufficiently apprised the petitioner of the charge against him and in holding that the commission of the conspiracy offense as charged does not require concert of action by a plurality of agents.

7. The Circuit Court of Appeals erred in holding that the appointment of Glasser's attorney over his objection, because of inconsistency of defenses to represent Kretske, was not prejudicial.

8. The Circuit Court of Appeals erred in holding that the grand jury was lawfully constituted, notwithstanding the deliberate exclusion of women, who were qualified jurors, from the jury box from which the grand jurors were selected.

Reasons for Granting Writ.

I.

The petitioner was denied the constitutional right to trial by a fair and impartial jury.

Affidavits for a new trial charge, in substance, that all the female names placed in the box from which the petit jurors were selected were presented to the clerk of the court from a list made up by the Illinois Women Voters league to the exclusion of all other females; that the females selected by said league had attended jury classes maintained for the purpose of giving instructions to potential jurors; that lectures before the jury classes presented the views of the prosecution; and that females otherwise qualified and eligible for jury service were deliberately excluded from the box; that first knowledge was acquired after verdict (R. 1049, 1057).

The affidavits were not controverted by the government and no testimony was taken. An offer of proof was contained in Glasser's affidavit (R. 1051).

It is worthy of note that the article of the American Bar Journal referred to in the affidavit in support of a motion for new trial, written by one of the women who was rejected as a juror in the instant case, and who writes of the experiences of those women who were not accepted on the panel, states that with one exception all the women were league members, while the men had apparently been selected at random (R. 1052).

The limitation of the body of citizenship from which female jurors were selected, struck at the very fundamental right of trial by jury and so perverted that right so as to amount to no jury at all.

The Circuit Court of Appeals held that The District Court was convinced that the appellants were not prejudiced, and under such circumstances they can not say he abused his discretion (R. 1139).

It is respectfully submitted that the right to a fair and impartial jury is a substantial right, guaranteed by the United States Constitution and due process of law, and not a right that is subject to the discretion of a District Court.

It is respectfully submitted that the Seventh Circuit Court of Appeals has rendered a decision in conflict with the applicable decisions of this Court.

In *Norris* v. *Alabama*, 294 U. S. 587, this court held that it was a denial of the equal protection of the laws, contrary to Fourteenth Amendment to exclude all persons of the African race, solely because of their color, from serving as grand or petit jurors.

In the instant case all female jurors not members of a private league of woman voters were excluded from petit jury service.

> "It is part of the established tradition in the use of juries as instruments of public justice that the jury be a body truly representative of the community."
>
> *Smith* v. *State of Texas*, 61 S. Ct. 164.

The limitation of female jurors to a special organization as in the instant case is not truly representative of the community.

> "Indictment by grand jury and trial by jury cease to harmonize with our traditional concepts of justice at the very moment particular groups, classes or races, otherwise qualified to serve as jurors in a community, are excluded as such from jury service."
>
> *Pierre* v. *State of Louisiana*, 306 U. S. 354, 358.

In the instant case the females as a class, not members of a private league of women voters, were excluded from jury service.

II.

The failure of the trial judge to maintain an attitude of unswerving impartiality between the government and the accused was a denial of due process of law and violated the petitioner's right to a fair and impartial trial, as follows:

(a) limiting the right of cross-examination to show bias, reward by and the coercive effect of government officers.

Government witness Swanson was a defendant in a criminal case pending in the U. S. District Court at Cleveland.

He testified to having had interviews with agent Bailey, who was active in bringing about the present prosecution (R. 712). Swanson was asked the following question on cross-examination: "Well, he, (meaning Bailey) could get that case called (for trial) or having something to do with it." The court sustained the objection of the prosecution and stated, "That is entirely out of order. Mr. Bailey is not running the courts down in Cleveland" (R. 237). The purpose of the question obviously was not as the trial court seemed to think, that Bailey was not running the courts in Cleveland, but to show the state of mind of the witness as possibly cross-examination might develop, that his testimony was biased because he was under the coercive effect of the officers of the United States who were party to the present prosecution.

On July 19, 1939, Government witness Dewes was sentenced to be confined in a penitentiary for a period of two years. On July 27, 1939, while still detained in Chicago, he gave the government a statement (Exhibit 114). He was brought back from Leavenworth Penitentiary and lodged in the county jail at Chicago on September 6 or 7, 1939, where he was held seven or eight weeks, during which time he was brought to the Federal Building about twenty times. Then he was taken to Milan, Michigan, from whence he was brought to testify (R. 554). At the trial he testified to matters not given in his statement of July 27, 1939.

He was asked, on cross-examination, whether or not he was now at Milan, Michigan. The court, in sustaining the prosecutor's objection, stated, "They are both Federal penitentiaries." When further asked on cross-examination, "Isn't it a fact that you are in what is known as a reformatory now," the court sustained the prosecutor's objection and stated, "You are in the Milan penitentiary

now." The witness then said, "Yes, sir" (R. 555). The cross-examiner's obvious purpose was to show that the prisoner had received favorable treatment in return for his testimony by being detained at Milan, Michigan, a federal reformatory, when he had been sentenced to confinement in a penitentiary.

It is respectfully submitted that the Seventh Circuit Court of Appeals has rendered a decision in conflict with the decisions of this Court and in conflict with the decisions of the Second, Fourth, Fifth, Eighth, Ninth and Tenth Circuit Courts of Appeals.

> "Cross-examination is a matter of right. It is prejudicial error to limit cross-examination of a government witness when the purpose of cross-examination is to show bias, coercion of situation, or expectation or hope of reward."
>
> *Alford* v. *U. S.*, 282 U. S. 687.
> *Farkas* v. *U. S.*, 2 Fed. (2) 644, 647 (C. C. A. 2).
> *King* v. *U. S.*, 112 Fed. 988, 995, 996 (C. C. A. 5).
> *Collenger* v. *United States*, 50 Fed. (2) 345, 350, 351 (C. C. A. 7).
> *Cossack* v. *United States*, 63 Fed. (2) 511, 516 (C. C. A. 9).
> *Asgill* v. *United S.*, 60 Fed. (2) 776 (C. C. A. 4).
> *Minner* v. *U. S.*, 57 Fed. (2) 506 (C. C. A. 10).
> *Heard* v. *U. S.*, 255 Fed. 829 (C. C. A. 8).

Mr. Campbell, the District Attorney, testified as a witness in rebuttal, and was required by Mr. Ward, the prosecutor, to give a yes or no answer to the question, "Q. At that time did you, preceding Mr. Glasser's entering the grand jury room to testify as a witness, have a conversation with him in which you used the following language—

'Dan, I knew you were going into the grand jury room this morning and I thought I would go in and put in a good word for you. I wanted to tell that grand jury there was nothing in your official conduct that would require investigation' " (R. 1041). Mr. Campbell at first replied, "I had a conversation with him—" Mr. Ward interrupted, "Q. Did you make that statement? A. I did not. Mr. Ward: Cross-examine."

Whereupon Mr. Stewart stated, "Now, your Honor, we had this discussion in chambers and the record does not show our talk there. Is it your Honor's ruling that on cross-examination I am limited to what he just stated now? The Court: That is all. Mr. Stewart: Because, if I am not, I would like to go into other matters to show which is most likely true— The Court: No, you are limited to it. Mr. Stewart: If I am so limited there is no cross-examination."

The court called counsel into chambers before Mr. Campbell took the witness stand and the court evidently impressed upon counsel that the cross-examination must be limited as stated in the colloquy above quoted. This ruling shut off the right of cross-examination.

It is evident that Mr. Campbell and Glasser had a conversation similar to the one narrated by Glasser, as Mr. Campbell began to describe a conversation before being stopped by Mr. Ward. By this ruling of the court the defense was prevented from attempting to show by cross-examination of Mr. Campbell that he made remarks substantially similar to these testified to by Glasser. Defense counsel were also prevented by this ruling from attempting to refresh Mr. Campbell's recollection regarding the alleged matter and were also prevented from inquiring as

to whether or not the witness had ever made any statements inconsistent with his denial of this conversation.

> "Cross-examination should be allowed as to details corroborative of defense contentions."
>
> *Dist. of Col.* v. *Clawans*, 300 U. S. 617, 632.

It is respectfully submitted that the Seventh Circuit Court of Appeals rendered a decision in conflict with the applicable decision of this Court.

(b) examining witnesses in a manner and making remarks favorable to the prosecution and prejudicial to the accused.

After District Judge Barnes testified in the Chrysler sedan case that the case was tried on the agent's statement, as is frequently done (R. 717-718) and after the petitioner had also testified on cross-examination that the case was tried on the agent's report (R. 873) the court asked the petitioner the following question: "Was any witness sworn or testimony taken?" This question which compelled an answer of "No," deprived the petitioner of Judge Barnes' testimony and tended to convey to the jury that witnesses have to be sworn or testimony taken in the Federal Court in order that a case be disposed of, and because no witness was sworn or testimony taken some irregularity existed in the manner in which the case was tried.

During the cross-examination of Anthony Hodorowicz by the defense, the Court interrupted and examined the witness to show that "a full disclosure" of the facts was not made by Glasser and that he was not interrogated by any lawyers before Judge Woodward (R. 348). There was only one appearance before Judge Woodward, and that was the arraignment, at which time, of course, no facts would be stated to the court, and the witness would not be interrogated. The petitioner represented Anthony Hodo-

rowicz, and the effect of the examination by the court created an inference that Glasser and the petitioner were withholding facts from the court.

The court examined government witness Swanson in a sarcastic manner, detrimental to the defense, saying in a declarative question, "The case just dropped out of mid air"? (R. 232).

During the re-direct examination of government witness Anthony Hodorowicz, who was in the same case with Swanson, the court summed up and repeated some of the contentions of the government as if conclusive against the petitioner, "You were never convicted, never paid a fine, and never went to jail. Answer. No" (R. 346).

The court questioned government witness Anthony Hodorowicz (R. 345) to show that the witness did not give to the petitioner, his attorney, the information from which the petitioner drew a rough diagram (Exhibit 38), the court assuming it to be a plan of the dimensions and layout of the still involved, thereby indicating to the jury that the petitioner obtained such information illegally from Glasser. Exhibit 38 shows that it is a diagram of the vicinity of Stony Island Avenue and 69th Street, pointing out where the witness, Anthony Hodorowicz, said he was apprehended, and does not indicate any dimensions of any still or layout of the plant as suggested by the court in his questions.

> "The impartiality of the judge—his avoidance of the appearance of becoming the advocate of either one side or the other of the pending controversy which is required by the conflict of the evidence to be finally submitted to the jury—is a fundamental and essential rule of especial importance in criminal cases."
>
> *Adler* v. *The U. S.*, 182 F. 464, (C. C. A. 5).

When Edward Wroblewski testified that the petitioner was his lawyer and after the witness had testified in response to the prosecutor's questions that he did not remember how he happened to go to the petitioner, the court conducted a lengthy cross-examination (R. 644-646), as to how he got acquainted with the petitioner and in one instance said, "You know something about how you happended to hire Mr. Roth. Now tell us the story about it." After asking a number of questions the court again stated, "And you don't want to tell us how you got to Mr. Roth's office," and then again stated, "Why don't you remember? Is there any reason why you should not remember?" This had to do with the petitioner's employment in a case not in the Northern District of Illinois and was immaterial to the issue being tried. The lengthy cross-examination of this witness tended to create the prejudicial inference that the witness was concealing something concerning the petitioner simply because he could not recall just how he happened to select the petitioner as his lawyer and that there was something irregular about his employment.

During the cross-examination of Kretske, the court said: "In the average case there is nothing difficult about the trial of any of those cases" (R. 816). This led the jury to believe that there was something irregular about Kretske's conduct in obtaining the assistance of the petitioner for the trial defense of alcohol cases, none of which had Kretske ever tried, either for the government when an assistant United States attorney or the defense. This impression reacted against the petitioner as well as the others, as it suggested irregularity in the prosecution.

(c) in cross-examining petitioner in a manner and making remarks injurious to petitioner's credibility and defense.

During the cross-examination of the petitioner the following occurred:

> "Mr. Poust: Mr. Roth is not deaf and neither are the jury. There is no cause for Mr. McGreal to yell at the witness.
>
> The Court: That is his method of cross-examining. He may proceed.
>
> Mr. McGreal: I may be a little deaf myself.
>
> Mr. Foust: I noticed when they cross-examined the Judge they did not yell.
>
> The Court: Mr. McGreal is not cross-examining a Judge. I have observed Mr. McGreal's method of cross-examination and he way proceed."

This remark tended to create the inference that a defendant is not entitled to the same consideration as other witnesses and detracted from the weight of his testimony.

> "It is important that hostile comment of the judge should not render vain the privilege of the accused to testify in his own behalf."
>
> *Quercia* v. *U. S.*, 289 U. S. 466.

On cross-examination of the petitioner the prosecutor inquired as to whether or not Glasser would be required to disclose all the evidence the government had in a still seizure, in connection with the criminal case while trying the civil case, at which the petitioner was not present, and the petitioner stated that he did not know if Glasser did this. The court then said, "You examined the case and the record on appeal. You must have, if you made an appeal. Then you know just as much about it as if you were present in court" (R. 870). An examination of the record of the trial of a civil case would not disclose whether

or not Glasser had disclosed all the evidence in his possession concerning the criminal case growing out of the same seizure. These remarks tended to discredit the witness in the eyes of the jury, since he could not say that Glasser disclosed all the evidence in the criminal case on the trial of the civil case.

During the cross-examination of the petitioner the court remarked, "Well, he (meaning the petitioner) has a lot of last answers" (R. 878). This tended to infer that the petitioner made different and conflicting answers, while testifying, when in fact no such conflict in his testimony existed.

This is not a case of confining an act to a single instance but one where many acts occurred, tending to create prejudicial inferences with a probable cumulative effect upon the jury which couldn't be disregarded as inconsequential. *Berger* v. *U. S.*, 295 U. S. 78.

> "The influence of the trial judge on the jury is necessarily and properly of great weight. His slightest word or intimation is received with deference and may prove controiling."
>
> *Quercia* v. *U. S.*, 289 U. S. 466.

It is respectfully submitted that the Seventh Circuit Court of Appeals has rendered a decision in conflict with the applicable decisions of this Court.

(d) in making statements of alleged fact based on his personal knowledge

The Judge cross-examined Glasser in regard to a certain Nick Abosketes as follows:

> The Court: Did you know at that time that Nick Abosketes was under indictment in the Eastern and Western Districts of Wisconsin?

A. No, sir.

Q. Did you make any inquiry?

A. No, sir; you see, my job was strictly to prosecute.

Q. You were interested in getting Nick Abosketes?

A. Yes, sir (R. 941).

At page 943 the judge re-emphasized this matter as follows: "I think my impression was that there were two indictments pending in Wisconsin against Nick Abosketes on February 25, 1938. I will ask the District Attorney's Office to check with the Alcohol Division sometime during the day, to make sure about it."

At page 1030, the judge said: "At my request, the government has furnished me with this. Let the record show that Nick Abosketes was indicted in the Western District of Wisconsin on January 27, 1936, and that he was indicted in the Eastern District of Wisconsin on July 30, 1938." * * * "To the indictment in the Western District he pled guilty and was sentenced." * * * "After that the indictment in the Eastern District was dismissed. It covers the same subject. I know that for a fact." * * * "I happen to know all about Nick Abosketes."

> The law is well settled that the trial judge should not assume the role either of an advocate or witness for the prosecution.
>
> *Quercia* v. *U. S.*, 289 U. S. 466.
>
> *Terrell* v. *U. S.*, 6 Fed. (2) 498 (C. C. A. 4).
>
> *Williams* v. *U. S.*, 93 Fed. (2) (C. C. A. 9).
>
> *Frantz* v. *U. S.*, 62 Fed. (2) 737 (C. C. A. 6).

It is respectfully submitted that the Seventh Circuit Court of Appeals has rendered a decision in conflict with

the applicable decisions of this court and in conflict with the decisions of the Fourth, Fifth, Sixth and Ninth Circuit Courts of Appeals.

(e) in admitting in evidence government agents' reports containing the criminal history of a co-defendant and ex parte statements tending to involve the co-defendant in a violation of the law.

Exhibits 81 and 113 introduced in evidence (R. 532, 533) contain a statement of various investigators' reports and the proposed testimony of witnesses, tending to implicate the defendant, Kaplan, in connection with the operation of an illicit distillery. The report describes his racial descent and states that he was reputed to be a bootlegger, worth $200,000.00, that he was arrested in connection with a killing, and that he was sentenced to pay a fine for violation of the National Prohibition Act.

The Circuit Court of Appeals held that the exhibits threw light upon the question whether the United States was being deprived of the honest and conscientious services of an Assistant United States Attorney and that the jury was instructed that the contents of the reports were not admissible against this petitioner (R. 1132).

The exhibits were not introduced for the purpose of notice to Glasser that he had a case to present to the grand jury and to attempt to prove that he had not done so. It was not contended that he did not present the cases and the government's evidence shows that he did present them (R. 528-529).

The criminal history of Kaplan and the ex parte statements prepared by the government agents were hearsay of the most pronounced kind and a denial of the right to be confronted with the witnesses.

The introduction of irrelevant, prejudicial, hearsay statements is reversible error.

Cook v. *U. S.*, 138 U. S. 157, 184, 34 L. Ed. 908, 913.

U. S. v. *Dressler*, 112 Fed. (2) 972 (C. C. A. 7).

Hass v. *U. S.*, 93 Fed. (2) 113, 125, 126, 127 (C. C. A. 9).

Paddock v. *U. S.*, 79 Fed. (2) 872, 873, 874 (C. C. A. 9).

Brady v. *U. S.*, 39 Fed. (2) 312, 314 (C. C. A. 8).

Naftzger v. *U. S.*, 200 Fed. 494, 499, 50 (C. C. A. 8).

Where prejudicial, incompetent evidence is introduced against any alleged conspirator, such is ground for reversal as to all of the defendants.

Logan v. *U. S.*, 144 U. S. 263.

Wheaton v. *U. S.*, 113 Fed. (2) 710 (C. C. A. 3).

It is respectfully submitted that the Seventh Circuit Court of Appeals rendered a decision in conflict with the applicable decisions of this court and in conflict with the decisions of the Third, Eighth and Ninth Circuit Courts of Appeals.

III.

The prosecutor resorted to persistent prejudicial misconduct and the petitioner was denied a fair and impartial trial.

The prosecutor refused to permit the defendant Glasser to examine files and reports in his possession for the purpose of refreshing his recollection in cross-examination, notwithstanding the order of the court to that effect (R. 980-982).

The prosecutor and judge conducted a minute and searching cross-examination regarding what education Glasser had to prepare for admission to the bar (R. 989-991).

In the interest of brevity the petitioner can not review and set up many instances of unfair tactics. In the event the petition for certiorari is granted they will be more fully set out.

It is respectfully submitted that the Circuit Court of Appeals rendered a decision in conflict with the applicable decision of this Court in *Berger* v. *U. S.*, 295 U. S. 78.

IV.

The evidence is utterly insufficient and requires a reversal in this case.

The petitioner respectfully urges that under the unusual circumstances of this cause and the close connection of the lack of evidence with the other points raised, it is appropriate for consideration.

V.

The record fails to show that the indictment was returned in open court by the grand jury.

The record shows that the September, 1939 grand jury was discharged on September 29, 1939 (R. 39) and there existed no record of the return of any indictments on that day.

On October 30, 1939, there was created for the first time a purported record that the grand jury returned four indictments in open court on September 29, 1939, with the

notation, "Added 10/30/39" (R. 39). It is significant to note that the purported record was made after October 12, 1939, when the petitioner was given leave to file a motion to quash (R. 40) and one day before the petitioner filed his motion to quash on October 31, 1939 (R. 40).

The Circuit Court of Appeals stated that the face of the indictment contains the notation, "A true bill," "George A. Hancock, Foreman," and the statement, "Filed in open court this 29th day of September, A. D. 1939, Hoyt King, Clerk," and that the record before then shows that on September 29, 1939, at a regular term of the District Court of the United States for the Eastern Division of the Northern District of Illinois the grand jury returned four indictments in open court (R. 1119). The Circuit Court of Appeals obviously gave full force and effect to the record that four indictments were returned in open court on September 29, 1939, notwithstanding the notation, "Added 10/30/39," which is some thirty days after the discharge of the grand jury and with no showing in the record by what authority the addition to the record was made.

The praecipe for the record (R. 132) called for a true and complete record of the return of the indictment and order to file same. All that was supplied appears in the record, page 39. No memorandum of any kind was furnished from which it might appear that the grand jury returned four indictments in open court on September 29, 1939, and that this petitioner was named as a defendant in any of them. Moreover, the record created on "10/30/39" makes no mention of the persons against whom the four indictments were returned.

> A record cannot be created where no memorandum of the record exists.
>
> *Gagnon* v. *U. S.*, 193 U. S. 457.

The notation on an indictment, "Filed in open court" does not meet the legal requirements.

Renigar v. *U. S.*, 172 Fed. 646 (C. C. A. 4).

The declaration of Amend. V to the Constitution, that "No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a grand jury" is jurisdictional.

Ex Parte Bain, 121 U. S. 1.

There must be an affirmative showing in the record that the indictment was publicly returned in open court by the Grand Jury and by its foreman delivered to the clerk.

Renigar v. *United States*, 172 Fed. 646 (C. C. A. 4).
Angle v. *U. S.*, 172 Fed. 658 (C. C. A. 4).
Yundt v. *The People*, 65 Ill. 373.
Rainey v. *The People*, 8 Ill. (3 Gil.) 71.
State v. *Heaton*, 23 W. Va. 773.

It is respectfully submitted that the Seventh Circuit Court of Appeals has rendered a decision in conflict with the applicable decisions of this Court and in conflict with the decisions of the Fourth Circuit Court of Appeals and abridges the right, as it exists, in the state of Illinois.

VI.

The indictment is vague, indefinite and uncertain and states the conclusions of the pleader, thereby failing to inform the petitioner of the nature and cause of the accusation.

The charging part of count 2 of the indictment, paragraph 14, appears on page 28 of the record.

The said paragraph does not allege and inform the defendants what the "questions, matters, causes and proceedings" were concerning which the defendant conspired to influence the decision and action of the said officers and employees; or what the "certain frauds on the United States" were; nor does the said paragraph describe the certain acts which the said officer or officers were "to do and to omit from doing" in violation of his or their official duty.

The court, in passing on the demurrer, stated:

> "The court is of the opinion that while the indictment is somewhat vague and indefinite, nevertheless it does charge the defendants with conspiracy to defraud the United States. However, I am of the opinion now that the defendants are entitled to a bill of particulars setting forth exactly what is charged and the times, places and persons involved. • • • that it is only right and proper, to lessen their burden of defense and so they may properly prepare, that they know definitely and in particular just exactly what they are charged with. This is not set out as definitely as it ought to be" (R. 160).

Where the indictment leaves a doubt in the mind of the Court concerning the offense intended to be charged it is fatally defective for uncertainty.

Bratton v. *U. S.*, 73 Fed. (2) 795 (C. C. A. 10).

The Circuit Court of Appeals, in passing on the indictment, said:

> "To us it *seems* that the indictment sufficiently apprised the appellants of the charge against them." (Petitioner's italics.) (R. 1122.)

In criminal cases the accused has the constitutional right to be informed of the nature and cause of the ac-

cusation. A crime is made up of acts and intent; and these must be set forth in the indictment, with reasonable particularity of time, place and circumstances.

U. S. v. *Cruikshank, et al.*, 92 U. S. 542.

See also:

Miller v. *U. S.*, 136 Fed. 581 (C. C. A. 7).
Beck v. *U. S.*, 33 Fed. (2) 107 (C. C. A. 3).
Bowkin, et al. v. *U. S.*, 11 Fed. (2) 484 (C. C. A. 5).
Anderson v. *U. S.*, 260 Fed. 557 (C. C. A. 8).
Brenner, et al. v. *U. S.*, 287 Fed. 636 (C. C. A. 2).
Fontana v. *U. S.*, 262 Fed. 283 (C. C. A. 8).
McKenna, et al. v. *U. S.*, 127 Fed. 88.
Bartlett v. *U. S.*, 106 Fed. 884 (C. C. A. 8).
Pierie v. *U. S.*, 275 Fed. 352 (C. C. A. 8).
Collins v. *U. S.*, 253 Fed. 609 (C. C. A. 9).

The charge of conspiracy (R. 28) will not lie because the commission of the substantive offense (Sec. 91 Title 18 U.S.C.) charged in the conspiracy requires a concert of action by a plurality of agents. *Gibardi* v. *U. S.*, 287 U. S. 112; *U. S.* v. *Sager*, 49 Fed. (2) 725 (C. C. A. 2); *U. S.* v. *Hagan*, 27 Fed. Supp. 214 (D. C. Ky.); *U. S.* v. *N. Y. C. & H. R. R. Co.*, 146 Fed. 298 (C. C. N. Y.); *U. S.* v. *Dietrich*, 126 Fed. 664 (C. C. Neb.)

It is respectfully submitted that the Seventh Circuit Court of Appeals has rendered a decision in probable conflict with the applicable decision of this court, and in conflict with the decisions of the Second, Fifth, Eighth, Ninth and Tenth Circuit Courts of Appeal.

VII.

The District Court appointed Glasser's attorney to represent Kretske. This was over Glasser's objection (R. 181) on the ground of inconsistency of defenses (R. 167).

It is respectfully urged that this affected the effective representation of Glasser as well as Kretske as to result in prejudice to this petitioner since the prosecution was directed at the failure of Glasser to render conscientious services as an assistant United States Attorney.

Counsel should not be appointed to defend clients having antagonistic interests.

Bopp v. *People*, 279 Ill. 184.

Error committed as to any one of the defendants in a conspiracy case is error as to all.

Logan v. *U. S.*, 144 U. S. 263.

VIII.

The grand jury was illegally constituted because of the deliberate exclusion of women from the jury box from which the grand jurors were selected.

The indictment was filed September 29, 1939 (R. 38). On October 12, 1939, when called for pleas, defendants were granted leave to file motions within twenty days and continuing the cause for pleas to November 3, 1939 (R. 40). A motion to quash (R. 141) was filed October 31, 1939 (R. 40). A motion to strike the motion to quash was filed by the U. S. Attorney (R. 150).

One of the grounds of the motion to quash was that the federal officials appointed to select grand jurors deliberately excluded all persons of the female sex, on account of their sex, from the jury box from which the grand jurors were drawn, notwithstanding the state law then in effect making it mandatory to include females on jury lists. The affidavit charges that the clerk of the court and the federal jury commissioner refused to follow the state

law on the ground that it was not mandatory. It further charged discrimination and the sufferance of substantial injustice by failure of the officials to follow the state law.

On May 12, 1939, the Illinois legislature amended Section 1 of the so-called "Jury Act" by making it mandatory that women be placed upon the jury list throughout the state (Sec. 1, Chap. 78, Ill. Rev. Statutes 1939), and to the same effect amended Section 2 of the "Jury Commissioners' Act" (Sec. 25, Chap. 78, Ill. Rev. Statutes 1939, particularly applying to counties having a population of 140,000 or more). This amendatory act, it must be conceded, became the law of the state on the date of its approval by the Governor, namely, May 12, 1939, although by virtue of the provisions of the State Constitution, to wit: Article 4 of Section 13, the act did not become effective until July 1, 1939.

The constitutionality of the amended act was sustained on August 8, 1939 in *People* v. *Traeger*, 372 Ill. 11.

By virtue of Sec. 412, Title 28 U. S. C., the clerk of the District Court for the Northern District of Illinois and the appointed jury commissioner are the persons who place in the box the names of the persons from which the grand jurors were selected.

The Circuit Court of Appeals held that the county boards were privileged to wait until September 1, 1939, by virtue of Sec. 1, Chap. 78, Ill. Rev. Statutes 1939 before including women on the jury lists and since the members of the September, 1939 grand jury were summoned August 25, 1939, there was no irregularity (R. 1118). But a reading of Sec. 1, Chap. 78 is impelling to the conclusion that county boards were required to act before September 1 to make effective the then existing law. "The county board of each county shall at or *before* the time of its meeting

in September, in each year, or at any time thereafter, *when necessary for the purpose of this Act* make a list of a sufficient number * * * of each sex * * * to be known as a jury list."

Moreover, the clerk of the court and the federal jury commissioner are not controlled by any state law fixing their meeting time as annually in September. Their position, as charged in the affidavit and admitted by the government's motion to strike, was that the law was not mandatory and that they were not required to follow it.

Sec. 411, Title 28, U. S. C. provides that jurors in the courts of the United States shall have the same qualifications as in the highest court of law in the respective states *when summoned for service* in the courts of the United States. (Petitioner's italics.)

The Circuit Court of Appeals held that there was no prejudice alleged in any way and that the objection was technical, the reason being that grand jurors do not try the case but merely charge the accused (R. 1118).

The crushing effect of an indictment is no light matter and an accused is entitled to the protection of the Constitution and every law and safeguard to prevent him from being put to trial on an indictment unless it is properly found and returned by a properly constituted grand jury.

> The selection of a grand jury by the officers, who by law are the only ones vested with that power, is not a mere defect or imperfection in form. It is a matter of substance which can not be disregarded without prejudice to the accused.
>
> *Crowley* v. *U. S.*, 194 U. S. 461.
>
> *Hoypt* v. *Utah*, 110 U. S. 574.

U. S. v. *Gale*, 109 U. S. 65.
Renigar v. *U. S.*, 172 Fed. 646 (C. C. A. 4)
U. S. v. *Lewis*, 192 Fed. 633 (D. C. Mo.).
State v. *Cantrell*, 21 Ark. 127.

Qualifications of Jurors and mode of their selection are matters for the legislature.

Tynan v. *U. S.*, 297 Fed. 177 (C. C. A. 9).

Where no attempt is made to comply with the legal method provided for the drawing, summoning, or impanelling jurors, a challenge to the array (or motion to quash) must be sustained even though no prejudice is shown.

People v. *Mack*, 367 Ill. 481, 487, 488.
People v. *Clempitt*, 362 Ill. 534.
People v. *Schraeberg*, 347 Ill. 392.
People v. *Fudge*, 342 Ill. 574.
People v. *Mankus*, 292 Ill. 435.
People v. *Lindquist*, 289 Ill. App. 250.

The Illinois State Legislature, having legislated on the qualifications of jurors, and the statute having been construed by the highest court of the state, the statute and the construction are controlling in the United States court.

Pointer v. *The U. S.*, 151 U. S. 396.

The Clerk of the District Court and the jury commissioner should have followed the Illinois statute when organizing the grand jury and should not have deliberately excluded female jurors. It was then the law of the state that women were qualified jurors.

Crowley v. *U. S.*, 194 U. S. 460.

It is respectfully submitted that the Seventh Circuit Court of Appeals has rendered a decision in conflict with the applicable decision of this court and in conflict with the decisions in the Fourth and Ninth Circuit.

Conclusion.

Wherefore, for the reasons stated, and for the reason that the Circuit Court of Appeals has so far sanctioned a departure by the lower court from the accepted and usual course of judicial proceedings as to call for an exercise of this court's power of supervision, and in furtherance of justice, petitioner respectfully submits that this petition for certiorari should be granted.

Respectfully submitted,

Alfred E. Roth,
Pro se.

APPENDIX.

Statutes Involved.

Section 88, Title 18, U. S. C. A., is as follows:

> "If two or more persons conspire either to commit any offense against the United States or to defraud the United States in any manner or for any purpose, and one or more of such parties do any act to effect the object of the conspiracy, each of the parties to such conspiracy shall be fined not more than $10,000, or imprisoned not more than two years, or both."

Section 411, Title 28, U. S. C. A. is as follows:

> "Jurors to serve in the courts of the United States, in each State respectively, shall have the same qualifications, subject to the provisions hereinafter contained, and be entitled to the same exemptions, as jurors of the highest court of law in such State may have and be entitled to at the time when such jurors for service in the courts of the United States are summoned."

Section 412, Title 28, U. S. C. A. is as follows:

> "All such jurors, grand and petit, including those summoned during the session of the court, shall be publicly drawn from a box containing, at the time of each drawing, the names of not less than three hundred persons, possessing the qualifications prescribed in the section last preceding, which names shall have been placed therein by the Clerk of such Court, or a duly qualified deputy clerk, and a commissioner, to be

appointed by the judge thereof, or by the judge senior in commission in districts having more than one judge, which commissioner shall be a citizen of good standing, residing in the district in which such court is held, and a well-known member of the principal political party in the district in which the court is held opposing that to which the clerk, or a duly qualified deputy clerk then acting, may belong, the clerk, or a duly qualified deputy clerk, and said commissioner each to place one name in said box alternately, without reference to party affiliations until the whole number required shall be placed therein."

Section 1, Chap. 78, Ill. Rev. Statutes, 1939, reads as follows:

"The county board of each county shall at or before the time of its meeting, in September, in each year, or at any time thereafter, when necessary for the purpose of this Act, make a list of sufficient number, not less than one-tenth of the legal voters of each sex of each town or precinct in the county, giving the place of residence of each name on the list, to be known as a jury list."

Section 25, Chap. 78, Ill. Rev. Statutes, 1939, reads as follows:

"The said commissioners upon entering upon the duties of their office, and every four years thereafter, shall prepare a list of all electors of each sex between the ages of 21 and 65 years, possessing the necessary legal qualifications for jury duty, to be known as the jury list. The list may be revised and amended annually in the discretion of the commissioners. The name of each person on said list shall be entered in a book

or books to be kept for that purpose, and opposite said name shall be entered the age of said person, his occupation, if any, his place of residence, giving street and number, if any, whether or not he is a householder, residing with his family, and whether or not he is a freeholder."

Section 91, Title 18, U. S. C. A. is as follows:

"Whoever shall promise, offer, or give, or cause or procure to be promised, offered, or given, any money or other thing of value, or shall make or tender any contract, undertaking, obligation, gratuity, or security for the payment of money, or for the delivery or conveyance of anything of value, to any officer of the United States, or to any person acting for or on behalf of the United States in any official function, under or by authority of any department of office of the Government thereof, or to any officer or person acting for or on behalf of either House of Congress, or of any committee of either House, or both Houses thereof, with intent to influence his decision or action on any question pending, or which may by law be brought before him in his official capacity, or in his place of trust or profit, or with intent to influence him to commit or aid in committing, or to collude in, or allow, any fraud, or make opportunity for the commission of any fraud, on the United States, or to induce him to do or omit to do any act in violation of his lawful duty, shall be fined not more than three times the amount of money or value of the thing so offered, promised, given, made, or tendered, or caused or procured to be so offered, promised, given, made, or tendered, and imprisoned not more than three years."